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NO. 88-1661

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD RIST, ACTING WARDEN
SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

V.

STEVEN SATTER,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF FOR RESPONDENT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1); 28 U.S.C. § 2101(c); and Rule 20.2 and 20.4 of the Rules of this Court. None of those give this court authority to grant certiorari with respect to a State Court decision.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Federal Constitutional provisions set forth in the Petition, Article VI, §9 of the South Dakota Constitution is involved:

> No person shall be compelled in a criminal case to give evidence against himself or be twice put in jeopardy for the same offense.

STATEMENT OF THE CASE

References to the trial transcript will be made by the letters TT followed by the applicable page number; to the habeas corpus transcript by HCT followed by the appropriate page number: to the appendix by A followed by the applicable page number; to the petition for certiorari by PC followed by the appropriate page number.

The bulk of petitioner's statement of the case is accurate. The following are

necessary to correct inaccuracies of omissions in it.

Sheriff Berg did go to the County Jail and question respondent about some burglaries (PC 8). However, his purpose in going to the jail was not to question respondent about burglaries - but about the bodies (TT 73; A 143).

When Berg asked about the bodies, respondent initially posed a hypothetical question. Petitioner states the conversation then went to other subjects and respondent later returned to the matter of the bodies (PC 9). The subject of their conversation did switch from burglaries to bodies (TT 72; A 141). However, once the topic switched from burglaries to bodies, it remained there (TT 75-77; A 148-152).

Petitioner asserts respondent was given at least six polygraph examinations relative to this crime (PC 11). The record reveals

the April 11, 1973 polygraph examination was with reference to this crime (HCT 69; A 314; A 126). There is no evidence that any other polygraph examination dealt with this crime. In fact, it affirmatively shows other polygraph examinations dealt with guns and another unrelated death (HCT 47, 77; A 306, 318).

Petitioner's reference to affidavits filed with a Stay Motion are improper (PC 14). They were submitted over one month after the Supreme Court Decision this court is being asked to review and are immaterial (A 370).

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS NOT PROPERLY INVOKED JURISDICTION.

Petitioner has sought to invoke this court's jurisdiction under 28 U.S.C. §1254(1); 28 U.S.C. §2101(c); and Rule 20.2

and 20.4 of the Rules of this Court (PC 4). Three of these deal with the timing and mechanics of filing a Petition for Certiorari; only one deals with the cases in which certiorari may be granted.

28 U.S.C. §1254(1) provides the situations in which this court may issue certiorari to a court of appeals. It is under this statute petitioner seeks to invoke jurisdiction. There is another statutory provision which confers authority to issue certiorari to a state court. For whatever reason, petitioner has not invoked it.

Since petitioner asks this court to issue certiorari under a statute dealing with decisions by courts of appeal, and since it is a state court decision of which petitioner complains here, he has not properly invoked jurisdiction and the petition should be dismissed.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN OREGON VS. ELSTAD, 470 U.S. 298 (1985).

In Miranda vs. Arizona, 384 U.S. 436 (1966), this court set forth the warnings which law enforcement must give a suspect before they question him. Oregon vs. Elstad, 470 U.S. 298 (1985) held that a statement proceeded by Miranda warnings was not automatically excluded because of a previous statement given by the accused without benefit of such warnings. Nothing in the decision of the court below in any manner conflicts with that holding.

The decision petitioner seeks to have reviewed arose out of a rehearing which the court limited to two issues (A 3). The first of these issues was whether Satter's statements to the sheriff were voluntary and admissible (A 3). Because of its decision

such statements were not admissible, the court declined to consider the remaining issue (A 3).

The only issue with which the court below dealt was whether the first unwarned statements made to Sheriff Berg were admissible. It did not deal with admissibility of the subsequent statements which were proceeded by Miranda warnings. In fact, it specifically declined to consider that question believing the habeas court was the more appropriate forum for dealing with whether subsequent statements or evidence were tainted by the prior unwarned statement (A 14-15).

Petitioner asserts the refusal of the South Dakota Supreme Court to apply the holding of Elstad has created a conflict with numerous state and federal decisions, which conflict should be resolved by this Court (A 23-25). The fact is: The decision below

does not conflict with Elstad, or with any other case which deals with admissibility of subsequent statements after an earlier unwarned statement. It can't be in conflict with such cases because it specifically refused to deal with that issue (A 14-15).

CONCLUSION

Petitioner has failed to cite any statute or Rule giving this Court authority to grant certiorari. Nor is the decision he wishes reviewed in conflict with Elstad or state and federal appeals courts which have applied Elstad.

Respondent respectfully requests the Petition for Certiorari be denied.

Dated this 1st day of May, 1989.

Respectfully submitted,

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